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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-

JACK L. MAYER,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 6061

JACK L. MAYER,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT.

MOTION TO DISMISS OR AFFIRM.

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Illinois Supreme Court on the grounds (1) that, as a matter of law, the Appellant has failed to show that he has a right to the relief sought, and (2) that this appeal presents no question not already decided by this Court.

THE NATURE OF THE CASE.

As the Appellant's jurisdictional Statement indicates, this is an appeal from an order entered by the Illinois Supreme Court denying Appellant's motion that he be furnished a *free complete verbatim transcript* of the two day jury trial at which he was convicted of two municipal

ordinance violations: to-wit, disorderly conduct and interfering with a police officer in the performance of his duties. These convictions arose out of an incident that occurred during an anti-Vietnam war demonstration which resulted in violence.

Appellant claims (Jurisdictional Statement, p. 6) that in his post-trial motion he urged that the proof was insufficient to sustain the verdict and that the prosecutor indulged in prejudicial misconduct. But the record filed does not reveal whether or not these points were specified in Appellant's post-trial motion.

In any event, after denial of his post-trial motion, Appellant moved for leave to proceed as a poor person and this was denied by the trial court (Appendix D). The order entered February 24, 1970, indicates that Appellant asked that he be supplied with a free transcript on appeal, pursuant to Illinois Supreme Court Rule 607, which was denied on the ground that the rule "applies to felony cases."

On March 24, 1970, Appellant renewed his application for a free transcript before a justice of the Illinois Supreme Court sitting between terms, who referred the matter to the full court. On September 18, 1970, the Illinois Supreme Court entered a memorandum order granting Appellant leave to proceed as a poor person, but denying him a free complete verbatim transcript.

ARGUMENT.

I.

THE APPELLANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO THE RELIEF SOUGHT.

Appellant invokes *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and its extension by *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969), to indigents convicted of municipal ordinance violations. It is the position of the Appellee that Appellant has failed to make a showing sufficient to bring himself within the ambit of these decisions.

The majority opinion in *Griffin* states (at 20):

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in cases. [Citing cases.] The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. [Citations.] We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

The concurring opinion of Mr. Justice Frankfurter in *Griffin* further observed (at 24):

> "But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing re-

view still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

These considerations were amplified and particularized by this Court in *Draper* v. *Washington*, 372 U. S. 487 (1963). We take the liberty of quoting this discussion (at 495, 496), crucial to the instant case, at some length:

"... [W]e reaffirm the principle, declared by the Court in *Griffin*, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S. at 20. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. . . . If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with

> funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."

The Appellant's reliance on *Hardy* v. *United States,* 375 U. S. 277 at 288, 289 (1963), in support of the proposition that an indigent is entitled to a complete transcript without proof that he needs it is misplaced. The majority opinion of this Court in *Hardy* is limited to cases in which the indigent is represented on appeal by a lawyer other than his attorney at the trial. In the instant case, Appellant's present counsel also represented him at the trial (Appellant's Brief in Illinois Supreme Court, p. 1). Therefore *Hardy* is inapplicable. Furthermore, *Hardy* was a federal criminal case and was decided not on a constitutional issue, but under this Court's more plenary power to promulgate rules of procedure for the federal courts.

The instant Appellant has failed to show why, if he is to present his appeal in the Illinois Supreme Court adequately, it is necessary (1) that he have a verbatim transcript, and (2) that he have a complete verbatim transcript.

As is indicated by the opinion of this Court in *Griffin* v. *Illinois,* 351 U. S. 12 at 20 (1956), the Illinois Supreme Court has broad powers to provide means of affording adequate and effective appellate review to indigent defendants other than a verbatim transcript. The Illinois Supreme Court has done so. Rule 323(c) of the Rules of the Illinois Supreme Court, as revised October, 1969, provides:

> ". . . [T]he appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 7 days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall,

> upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings."

The Appellant has made no attempt to proceed in this alternative fashion. He has not come forth with any proposed report of proceedings of his own, prepared, as the rule requires, while the proceedings are still fresh in memory. There is nothing in the record intimating that Appellant has sought to draft, as suggested by this Court's opinion in *Draper* v. *Washington,* 372 U. S. 487, at 495 (1963), "a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes."

Another alternative is afforded by Illinois Supreme Court Rule 323(d), which permits the parties by written stipulation to "agree upon a statement of facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings." Since one of Appellant's contentions on appeal is that the prosecutor was guilty of prejudicial misconduct, such agreement might in the instant case be difficult or impossible. Yet, it is by no means inconceivable that the prosecutor might consider his conduct in no wise prejudicial and be willing to stipulate to having said and done what he said and did. Appellant has made no attempt to work out an agreed statement of facts.

Another point on appeal that Appellant is attempting to urge is his defense of "necessity." He claims that his admitted interference with the action of the police, during a riot, while they were removing an injured person from a city street, was necessary, because, he, a medical student possessing some medical knowledge, could surmise that doing so might result in more serious damage to the injured one. Surely a 300 page transcript is not required to present

the point that the trial court erred in declining to give an instruction setting forth Appellant's theory.

Appellant's other point on appeal is that his two convictions were contrary to the manifest weight of the evidence. But this Court specifically stated in *Draper* v. *Washington*, 372 U. S. 487, at 496 (1963), that if the assignments of error go to the rulings on evidence or to its sufficiency, the transcript provided can be limited to the portions relevant to such issues and that "it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted."

Appellant also presents an erroneous rendering of the Illinois Supreme Court Rule he urges is "unconstitutional." He claims (Jurisdictional Statement, p. 4) that Rule 607(b) prohibits the provision of trial transcripts at state expense to indigents seeking review of convictions for offenses other than felonies. The literal reading of that rule is that it authorizes indigents convicted of felonies to petition the trial court for a report of proceedings. The exact language of the rule is:

> "In any case in which the defendant is convicted of a felony, he may petition the court in which he was convicted for a report of proceedings at his trial."

That the rule does not also mention misdemeanors and quasi-criminal matters does not make it unconstitutional.

Milani v. *Illinois*, 386 U. S. 12 (1967), reversing 34 Ill. 2d 524, cited by Appellant (Jurisdictional Statement, p. 21), is a mere memorandum order. The state court decision there reversed—*People* v. *Milani*, 34 Ill. 524 (1966)—simply held (at 527) that defendant's contention that the transcript was "incomplete and inaccurate" was "of no consequence on appeal" because of his substituted plea of guilty. On appeal

defendant claimed his plea of guilty was coerced. There is no basis for Appellant's view that this Court disregarded the criterion of "need" for the transcript.

Roberts v. *LaVallee,* 389 U. S. 40 (1967), cited by Appellant (Jurisdictional Statement, pp. 20, 21), turned on that petitioner's right to relief in federal habeas corpus proceedings without being required to resort to further state court proceedings. It was the dissenting opinion of one justice that expressed the view that the petitioner therein had not suggested the need for a transcript of the preliminary hearing. The majority opinion did not deal with the need to demonstrate need.

To sum up, Appellant has not complied with the actual tenor of *Griffin* v. *Illinois* and *Williams* v. *Oklahoma City.* He demanded more than he was entitled to under those decisions. By asking too much and doing too little to help himself, Appellant deprived the Illinois Supreme Court of a fair opportunity to vindicate his constitutional rights.

II.

THIS APPEAL PRESENTS NO QUESTION NOT ALREADY DECIDED BY THIS COURT.

The points raised by Appellant have already been fully disposed of by this Court in *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969).

CONCLUSION.

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the Illinois Supreme Court denying Appellant's motion to be furnished without cost, a complete verbatim transcript of the proceedings in the trial court.

Respectfully submitted,

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January 18, 1971.